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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945.

No. 827

EDITH VANDEVOIR, Petitioner,

vs.

SOUTHEASTERN GREYHOUND LINES,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

ERNEST M. WRIGHT,
FRANK R. MILLER,
ERNEST M. CAUSEY,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945.

No.

EDITH VANDEVOIR, PETITIONER,

vs.

SOUTHEASTERN GREYHOUND LINES.
RESPONDENT

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Seventh Circuit was rendered November 30, 1945. (R. 57, 58). The decision will be found in the record. (R. 54). At the time of preparing and filing this brief the opinion has not been officially reported.

II.

Jurisdiction.

1.

The provision of the Federal Code believed to sustain the jurisdiction of this court is Title 28, Section 347, Clause (a) of the Judicial Code, 48 Stat. 926; and Rule 38, Clause 5, of this court.

2.

The date of the judgment to be reviewed is November 30, 1945. (R. 57, 58).

3.

The decision in this case is in conflict with decisions of the Second, Sixth and Seventh Circuits; is in conflict with decisions of this Court; and in conflict with state policy and the weight of authority.

The involved question is one of general importance on corporate status as to residence or nonresidence in a foreign state where it has qualified to transact business. The extent of corporate activities beyond the chartering state requires that there be certainty and uniformity as to such status. This certainty and uniformity is important to every jurisdiction.

III.

Statement of the Case.

This action was brought to recover damages for personal injuries sustained by petitioner while a passenger on a bus of respondent. The injury occurred in the state of Tennessee.

Petitioner is a citizen of Indiana, purchased her transportation in Indiana and became a passenger of respondent in Indiana for transportation to a point outside Indiana.

Respondent is a corporation organized under the law of Kentucky; but transacting an extensive business in Indiana as an interstate carrier by virtue of a required certificate of authority from Indiana, and has a resident agent in Indiana for the service of process.

Respondent filed motion for summary judgment on the ground it was a nonresident of the state of Indiana and the

action, therefore, barred by an Indiana limitation statute (R. 5 and 12). After hearing on stipulation of facts, documentary and oral evidence, the trial court made its finding and conclusions (R. 26-42), and entered judgment against petitioner (R. 42). From this judgment petitioner appealed to the Circuit Court of Appeals of the Seventh Circuit and the summary judgment was affirmed. (R. 57, 58).

The trial court and the Circuit Court of Appeals decided respondent was a nonresident of Indiana within the meaning of an Indiana statute because of the non-migration doctrine, and that the action was barred by reason of such nonresidence.

The Indiana statute, including its published heading, is as follows:

> "*Nonresidence of defendant* or absence on public business not considered—*Exception* as to *nonresidence.*—The time during which the defendant is a *nonresident* of the state *or* absent on public business shall not be computed in any of the periods of limitation; but when a cause has been fully barred by the laws of the place where the defendant *resided*, such bar shall be the same defense here as though it had arisen in this state; Provided, That the provisions of this section shall be construed to apply only to causes of action arising without this state." (Italics supplied).

IV.

Specification of Errors.

Petitioner maintains the respondant is a resident of Indiana within the meaning of such statute and that the judgment of the Seventh Circuit should be set aside because of its conflicts, and because of the uncertainty and lack of uniformity it creates as to corporate status in a foreign state.

1.

There is conflict with a decision of the Sixth Circuit (Baltimore & O. R. Co. v. Reed, 223 Fed. 689, 697); the home circuit (Dodge Mfg. Co. v. Patten, 60 F. 2d 676), which latter decision this court pronounced sound in the Neirbo Case, 308 U. S. 165; also, conflict with a decision of the Second Circuit (Moss v. Atlantic Coast Line R. Co., 149 Fed. 2d. 701).

2.

The Circuit Court of Appeals based its conclusion on certain decisions in conflict with the latest expression of this court in the Neirbo Case (308 U. S. 165) and now Shoe Company (90 L. ed. 109) and Williams (Jan. 7, 1946); also in conflict with Woodworth (111 U. S. 138); Taylor (266 U. S. 200) and Transportation Co. (292 U. S. 511); and undertakes to reestablish a discarded fiction as to corporations.

3.

There is conflict with state policy as declared by applicable local statutes against discrimination and fiction (Burns Revision of 1933, Section 25-302; Vol. 6, page 60; Sec. 2-1050, Vol. 2, page 188; Section 49-1417, Vol. 10, page 98); conflict with applicable local decisions; and conflict with the great weight of authority on limitation statutes as disclosed by decisions in Mississippi, New York, Missouri, Illinois, Iowa, Montana, Okahoma, Tennessee and Texas.

V.

Summary of the Argument.

The sole question is that of residence, not citizenship, of a foreign corporation qualified and transacting business in Indiana within the meaning of an Indiana limitation statute.

The terms residence and citizenship are not synonymous. The involved statute does not use the term citizenship. Residence is the status to be determined.

Petitioner contends respondent having qualified to transact business in Indiana, having an agent for the service of process, having a place of business and doing a very substantial business in Indiana is not a nonresident within the meaning of the statute.

The Sixth Circuit has interpreted the first clause of this Indiana statute and that decision is contrary to the instant decision. The instant decision is based on the non-migration fiction which puts it in conflict with the Second and Seventh Circuit, in conflict with this Court in Neirbo and other cases, against the public policy of the State of Indiana as to discrimination and fiction, and contrary to the great weight of authority. Nine states have held that within the meaning of a limitation statute foreign corporations qualified within a state are not nonresidents.

VI.

ARGUMENT.

a.

Sixth Circuit.

The Sixth Circuit (Baltimore & O. R. Co., v. Reed, 223 Fed. 689, 697) construed the first clause of the involved section as to a railroad foreign corporation and held:

> "The conclusion is inevitable that it was competent at all times for the plaintiff below to have sued the company in Indiana, and that, on the authority of McCabe v. Illinois Central Railroad Co., Southern Railway Company v. Mayes, and Tiller v. St. Louis & Santa Fe Railroad Co., supra, the defendant below was *not a nonresident, as that term is used* in section 298, Burns, providing that the period of absence 'shall not be computed in any of the periods of limitation.'" (Italics supplied)

This holding is in harmony with state courts of appeal as set out under item "g" following.

In the instant case the Seventh Circuit holds a bus line foreign corporation is a nonresident under the second clause.

Each clause of Section 2-606 deals with the same status. Consistency with physical structure, wording and state policy requires the construction that a resident within the meaning of the first clause is a resident under the second. If fact prevails over the non-migration fiction in the first clause, as in the Reed and other cases, then this same fiction must give way to fact under the second. The Seventh Circuit in Sheldon etc. Corporation v. Commissioner, 118 Fed. 2d 835 at page 836 recognizes this principle:

> "It may be conceded that a corporation in certain respects is a fiction, but certainly it would not be equitable

> to treat this corporation *as a fact* as against the creditors and *a fiction* against the Government." * * * (Italics supplied)

The word "but" as commonly used means "except". A statutory exception is a restriction on the operation of the statute. Gatliff Coal Co. v. Cox, 142 Fed. 2d 876, 882. The second clause being an exception to the first is therefore dealing with the same status.

Also, the companion words "non-resident" in the first clause and "resided" in the second presumptively carry the same meaning. Ryan v. State, 174 Ind. 468, 474.

In addition, it is state policy that there be no discrimination in favor of a foreign corporation as against a domestic corporation. Burns 1933, Section 25-302. This section declares general equality, not discrimination, when foreign corporations qualify in the state. Neirbo (page 172) refuses to presume discrimination in favor of a foreign corporation.

Since residence is measured by the same standard in each clause, the decision in the instant case is in conflict with the Sixth Circuit.

b.

Seventh Circuit.

There is conflict in principle with the Dodge Case, 60 Fed. 2d 676 of the Seventh Circuit. The Dodge Case dealt with a Federal venue statute which requires suit in the district of the "residence" of one of the parties; and held a Delaware corporation qualified and doing business in Indiana was a resident. Of the Dodge Case this Court (Neirbo) said:

> "We deem this practice sound, and it controls the present case."

c.

Second Circuit.

The instant decision meets conflict with the Second Circuit, the Circuit of the Neirbo Case. That Circuit did not deal with a limitation statute, but in Moss v. Atlantic etc. Co., 149 Fed. 2d, at 701, said:

> "In Neirbo v. Bethlehem Shipbuilding Corporation, Inc., 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. 167, 128 A. L. R. 1437, the Supreme Court held, that, when a foreign corporation had in another state given a consent to be sued, it became a '*resident*' within Section 112." (Italics supplied)

d.

United States Supreme Court.

The instant decision is based on the non-migration idea which after a varied career met its finality in Neirbo. And still later a further rebuff in Shoe Company and Williams. Certain cases are cited in the instant opinion which support the non-migration idea, but there is no discussion of other decisions of this court which reject it.

As early as 1883 this court commenced to look differently at foreign corporations. In New England etc. Co. v. Woodworth, 111 U. S. 138, a foreign corporation doing business in Illinois was held to be a resident of that state so as to support the appointment there of an administrator. In this decision reference is made to corporate activities in other states and, after concluding there was residence in Illinois for the purpose just mentioned, it is said:

> "Nor is there anything inconsistent with this view in the fact that, as a Corporation of *Massachusetts*, the de-

fendant removed the suit from the state court on the ground of diversity of *citizenship.*" (Italics supplied).

Thereby recognizing citizenship in Massachusetts for removal purposes and a residence in Illinois for another purpose.

This decision was cited by Justice Cardozo while on the New York bench in support of one of the decisions mentioned under item "g" following. The principle of the Woodworth decision, although not cited, was carried forward by Justice Cardozo in his opinion, without a dissent, in International Milling Co. v. Columbia Transportation Co., 292 U. S. 511. In Transportation Co. at bottom of page 518 reference is made to the Taylor Case as follows:

> "The opinion pointed out (1) that for anything made to appear the negligence of the connecting carrier may have occurred in Missouri where the goods were to be delivered, and (2) that '*the plaintiff consignee is a resident of Missouri—that is, has a usual place of business, within the state.*' " (Italics supplied.)

And while referring to the Shaw and Seaboard Cases as supporting the proposition that for many purposes corporate "domicile" is in the chartering state, these decisions were not followed on the question of residence. The corporation under consideration by Justice Cardozo in Transportation Co. was characterized as follows:

> "In a very *real* and *practical* sense, it is a *resident* of the forum like the plaintff in the Taylor Case, (266 U. S. 200, 207) who was *domiciled* in one state and *resided* in another." (Italics supplied.)

The plaintiff in the Taylor Case was "a Delaware corporation with a usual place of business in Missouri." The question before the Court in Transportation Co. and Taylor was one of asserted interference with interstate commerce; but the ques-

tion of residence was an element considered. In each of these cases the corporation was looked at as it actually was; and as in Neirbo "classics" and "metaphor" gave way to reality. Included in language used in the Taylor Case is the following:

> "The American Fruit Growers Inc., a *Delaware corporation* with a *usual place of business in Missouri,* brought an action * * *
>
> "Here, the *plaintiff* consignee is a *resident* of Missouri,—*that is,* has a *usual place of business within the state;* * * *" (Italics supplied.)

The Taylor decision by Justice Brandeis, and like Justice Cardozo without a dissent, was in 1924; Seaboard, 1926; and Transportation Co. in 1934.

The Seaboard Case, cited in support of the instant decision follows on the heels of Taylor but goes back of it and seeks support in Keasley, and a kindred case, of which proper disposition is made in Neirbo.

This non-migration fiction as petitioner believes originated in a dictum in the Earle Case, 13 Peters 519, where the only thing for decision was the legality of a transaction in a foreign state. The decision was that the transaction was legal, thereby upholding migration so far as the transaction of business is concerned. This was a decision in 1839, quite likely in advance of legislation in many states by which foreign corporations were admitted, and far in advance of present day corporate activities. Also, at a time when there was still some uncertainty as to corporate citizenship for jurisdictional purposes. Marshall Case (1846), 16 Howard 314.

The language in the Earle dictum is to be observed. It is said corporations exist by force of law and where the law ceases to operate, the existence ceases. This is the foundation

for the non-migration idea. It perhaps is sound so far as the law of the chartering state can empower existence beyond its boundary. But it sustains migration in the adjoining state which by legislation gives existence there.

It is definitely inaccurate to say a corporation has no existence except in its chartering state. This requires a disbelief in your own eyes when you read the signs at bus and railroad stations, on store windows and observe the activities there. Reason, reality and certainty in corporate status join in the requirement that in harmony with Woodworth, Taylor, Transportation Company, Neirbo, Shoe Company and Williams, it definitely be settled that a corporation, though a citizen of its chartering state only, has residence in any other state which gives existence within its jurisdiction.

The Harris Case, cited in the instant decision in support of non-migration, carries language at variance with the non-migration fiction. It is said:

> "A corporation is in law, for civil purposes, deemed a *person*. It may sue and be sued, grant and receive, and do all other acts not ultra vires which a natural person could do." (Italics supplied.)

Under Indiana law and likewise other jurisdictions (Croop, 199 Ind. 262, 270) an individual may have citizenship in one state and residence in another.

And this same Harris Decision carries further language which is inconsistent with non-migration:

> "But turning our attention from this view of the subject and looking at the statute alone, and reading it by its own light, we entertain no doubt that it made the company liable to suit, where this suit was brought in all *respects* as if it had been an *independent corporation of the same locality.*" (Italics supplied).

While the non-migration fiction is repeated in the text of the decision, the conclusion reached is based on reality.

It is not wholly unfounded to say that there may have been inaccuracy in the use of the word residence in some of the cases. Citizenship and residence were distinguished by this court so far back as 1798 (3 Dal. 382) and continuously thereafter, including Donaldson (268 U. S. 398, 399). The Francis Case (78 U. S. 210, 216) cited in support of the instant decision confuses the terms. There the only question was citizenship under the jurisdiction statute.

e.

State Policy.

The instant decision construes an Indiana statute in conflict with state policy in two particulars.

The construction results in discrimination against a domestic corporation because as against them there is two years in which to sue. The respondent is given a special privilege of a one year limitation statute of another state and that as against a citizen of Indiana, who bought transportation and took passage in Indiana. Burns 1933, Section 25-302 declares for equality.

State policy as to fiction also is violated. Section 2-1050 provides:

> "All *fictions* in pleading are *abolished*, and their use forbidden in the courts of justice in this state." (Italics supplied).

A further condemnation of fiction is Section 49-1417, where it is provided:

> "No officer of this state, county, township or other officer, shall ever tax up, charge, receive or suffer to be

taxed up, or receive in such office, under color of such office, any fee or sum of money for services contemplated to exist only by legal *fiction.*" (Italics supplied).

As to such state policy this court spoke in the Blackstone Case (188 U. S. 189). At page 206 it is said:

"When *logic* and the *policy of a state* conflict with a fiction due to historical tradition, the *fiction* must give way." (Italics supplied).

In Miami Coal Co. v. Fox, Treasurer, 203 Ind. 99, Indiana rejected the fiction mentioned in the Blackstone Case (mobilia sequuntur personam) and denied the right to tax an Indiana corporation in Indiana on property which had acquired a business situs in Illinois.

f.

Local Decisions.

The instant decision also conflicts with the reasoning of Indiana decisions on the question of corporate residence.

The Haskell Case, 11 Ind. 301, speaking of a domestic railroad under the Indiana venue statute at page 303 says:

"Again, we are referred to Sec. 33 of the same act, which says that, 'In all other cases, the action shall be commenced in the county where the defendants, or some one of them, has his usual place of *residence.*' 2 R. S. p. 34. Even if this provision is at all applicable to railroad corporations, which is doubtful, it would not be an unfair construction to say, that such corporations may be regarded as *resident in each county* in which they have an office or agency, or an officer or agent upon whom process may be served." (Italics supplied).

In harmony with this are Pittsburgh etc. Railroad Co. v.

Indianapolis, 147 Ind. 292, and Pittsburgh etc. Railway Co. v. Harden, 137 Ind. 486. In the former at page 295 the court says:

> "The authorities to which counsel refers have relation, for the chief part, to the *domicile* of corporations. In *general*, the *domicile* of a corporation is in the state from which it receives its charter; though a railroad company *having its road* in two or more states, but being one corporation, with one management and board of directors, may be said to be a separate corporation *in each of said states*, and governed as to its property in each state by the laws thereof." (Italics supplied).

Substantially the same language will be found at page 492 of the Harden Case.

It is true that in the Indianapolis Case there are quotations from a text writer which carry the non-migration idea in a none too accurate manner, but the language of the court itself as above quoted shows what was in the mind of the court.

It is also true that the McDonough Case, 164 Ind. 321, cited in the instant decision, carries a general statement that "a corporation can have no legal existence beyond the boundaries of the sovereignty which created it, * * *". Citing among others the Earle Case and the Schollenburger Case. The question of residence in a foreign state by virtue of qualification there was neither decided nor discussed. While the general statement is that an Indiana corporation can have no legal existence beyond Indiana, yet the decision recognizes an existence in Pennsylvania and upholds a judgment there against the corporation.

The Haskell Case is significant when compared with two Illinois decisions. The Bristol Case, 15 Ill. 436, speaks of a domestic railroad as does the Haskell Case. And the Bristol

Case is cited later in Illinois (307 Ill. 45, 49) in support of the proposition that a foreign corporation doing business in Illinois is not a nonresident within the meaning of the Illinois attachment statute.

Before going to state court decisions which deal directly with limitation statutes it is of some consequence to observe that Kentucky, the chartering state of the respondent, holds a foreign railroad with but a spur track running across the river into Louisville is a resident of Kentucky within the meaning of the Kentucky venue statute. Knight v. Pennsylvania R. Co., 264 Ky. 412, 417-418; 94 S. W. 2d 1013, 1015-1016 (1936). Kentucky rejects fiction and follows fact.

g.

Weight of Authority.

The instant decision cites in support of the non-migration idea an Oregon Case, Hamilton v. North Pacific etc. Co., 164 Pac. 579. The statute there involved provides in part as follows:

> "When the cause of action has arisen in another state * * * *between nonresidents of this state*, and by the laws of the state, * * * where the cause of action arose, an action cannot be maintained thereon by reason of the lapse of time, no action shall be maintained thereon in this state." (Italics supplied).

As this language indicates and as the court at page 582 says:

> "The purpose of the Legislature in enacting the statute was to remove any possible encouragement which might otherwise be offered for the bringing in the Oregon court of litigation which more *properly belongs elsewhere.*" (Italics supplied).

Thus it was sought to defeat litigants coming to Oregon and litigating claims which had lapsed before their coming. The

petitioner here was both a citizen and resident of Indiana. She purchased her transportation and took passage here. She did not come to Indiana to revive a lapsed cause. She should not be denied recovery as against a foreign corporation, when no such denial would exist as to a domestic. The legislature intended no such discrimination in favor of the foreign corporation.

The Oregon court undertakes to distinguish a Mississippi case and a Kentucky case which are characterized as supporting an opposite doctrine, and of this Mississippi case remarks:

> "* * * the Mississippi statute is wholly unlike the Oregon statute."

So far as the Mississippi statute bears on the question of residence of a foreign corporation the purport is the same. And neither does the Mississippi statute provide, as the Oregon case states, that it shall not apply to a corporation doing business in two or more states at the same time.

And it must be further noted that this Oregon Case is based on fiction. Referring to that of mobilia sequuntur personam and citing the Shaw Case in support of the non-migration idea.

The Mississippi Case (Louisville etc. Co. v. Pool, 72 Miss. 487, 16 So. 753) construing a statute of similar import to Indiana and involving similar facts definitely upholds this petitioner's position, and remarks as follows:

> "But a corporation may, for many purposes, be resident in many states at one time; * * *"

Consistent with this Mississippi Case will be found decisions from New York, Missouri, Illinois, Iowa, Montana, Oklahoma, Tennessee and Texas.

> McConnell v. Caribbean Petroleum Co., (1938) 278 N. Y. 189, 195; 15 N. E. 2d 573, 575;

Comey v. United Surety Co., (1916) 217 N. Y. 268, 274; 111 N. E. 832, 834;

Sidway v. Missouri Land & Live Stock Co., (1905) 187 Mo. 649, 673; 85 S. W. 150, 156;

Pennsylvania Company v. Sloan, (1878) 1 Ill. App. 364, 372;

Wall, Adm'r. v. Chicago & N. W. Ry. Co. (1886) 69 Iowa 498, 499-501; 29 N. W. 427, 428;

King v. National Mining and Exploring Co., (1881) 4 Mont. 1, 5-7; 1 Pac. 727, 730-731;

St. Louis etc. R. Co. v. Taliaferro (1917) 67 Okla. 37, 38-39; 168 Pac. 788, 789;

Turcott v. Yazoo & M. V. R. Co., (1898) 101 Tenn. 102, 108; 45 S. W. 1067, 1068-1069;

Thompson v. Texas Land & Cattle Co., (Texas-1893) 24 S. W. 856, 857.

In each of these cases the courts speak of the residence of foreign corporations with reference to limitation statutes. All these decisions hold a foreign corporation is a resident within the meaning of limitation statutes.

The late New York case (McConnell, 278 N. Y. 189, 195; 15 N. E. 2d 573, 575) will serve to demonstrate:

> "For the purposes of the Statute of Limitations this defendant is not a nonresident."

Citing in support a Cardozo decision (Comey, 217 N. Y. 268, 274-275). In the Comey Case Justice Cardozo dealt with a foreign corporation doing business in New York, and used the following language:

> "* * * but it owes to the laws of this state the privilege of doing business within our borders. In exercising that privilege it may be dealt with as if it were in truth a

> domestic corporation. * * * Its presence here is 'not temporary, but continuous', and under the authority of our laws."

Citing in support New York cases and the Woodworth Case (111 U. S. 138), and then holding that a foreign corporation qualified to transact business in New York is not a nonresident within the meaning of the limitation statute.

This same Justice while on the New York bench (Diehl, 216 N. Y. 57, 63-64) dealt with a foreign corporation under another New York statute and spoke as follows:

> "As long as a foreign corporation keeps away from this state, it is not for us to say what it may do or not do. But when it comes into this state and transacts its business here, it must yield obedience to our laws. * * * For many purposes the fiction of its residence in the state of its origin must then be disregarded."

And as previously stated under item "d", this thought was carried forward to the Supreme Court in Transportation Co. and has recent vindication in Neirbo, Shoe Company and Williams.

CONCLUSION.

In view of the holdings of this court, also the Second, Sixth and Seventh Circuits, and the great weight of state authority, all of which declare against the non-migration fiction; in view of state policy; correct statutory interpretation; and in the interest of uniformity and certainty the writ should be granted.

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